JUDICIAL PRECEDENTS. — A SHORT STUDY IN COMPARATIVE JURISPRUDENCE.

THE weight attached to precedent in every department of life is closely connected with the force of habit, and has its root deep in human nature. That judicial precedents have exercised great influence in all systems of law is more than probable; the feeling that a rule is morally right has often arisen from the fact that it has long been followed as a rule; but the degree in which judicial decisions have been openly recognized as authoritative, simply because they are judicial decisions, has varied very greatly in different systems. Judges are everywhere largely influenced by what has been done by themselves or their predecessors, but the theories to explain and control such influence have been diverse, and the development of the law has not been unaffected by them.

It may, perhaps, be of some interest to compare a few of these theories.

Two things should be borne in mind. In the first place, the functions of courts are not in practice confined to the decision of particular causes. Either by authority expressly delegated, or of their own motion, courts have undertaken to legislate with regard to the conduct of litigation before themselves; they have published general rules, in the form of command or permission, setting forth the manner in which they will proceed. The most striking example is the edict of the Roman prætor, which became a chief instrument in the development of the Roman law. Doubtless special cases gave rise to many of its provisions, but none the less it was in form a legislative, not a judicial act. The Scotch Court of Sessions, in its Acts of Sederunt, assumed extensive powers of enacting laws, and in our days governments have frequently intrusted to courts a wide authority to make rules of procedure. All this lies outside of our present limits. Such rules are not judicial precedents.

Further, the peculiar effect and quality of a judicial precedent as a source of law should be noted. So far as it expresses the opinion of wise or learned men, or so far as it expresses the opinion of the community, it may be a source of law; but its peculiar force as a judicial precedent lies, not in its accordance with philos-

ophy or common sense; not in the fact that it is right, not that it ought to have been made, but that it *has* been made. Of course the decision of a court may unite the character of a judicial precedent with the character of an expression of wise thought or of popular sentiment, but often these characters are separated. To go no farther than our own law, there is no difficulty in finding decisions standing as precedents, at which, like the Rule in Dumpor's Case, "the profession have always wondered," or which, at any rate, are no expression of contemporary opinion, and would never be made at the present day.

Roman Law. — Of judicial precedents as a source of law we find nothing in the time of the Republic, unless so far as the rulings of the pontifical college had this character, Dig. I. 2, 2, § 6. The manner in which the *pontifices* intervened in lawsuits between individuals is very obscure, and must remain largely matter of conjecture. 1 Ihering, Geist des röm. Rechts, § 18 a. At any rate, before the end of the Republic, their power of controlling litigation appears to have greatly diminished, and the practice of giving opinions had passed to the unofficial body of jurisconsults, *juris prudentes*, who seem to have enjoyed great public consideration; but the opinions of these jurisconsults, however worthy of respect, were in no way binding on the magistrates and judges. They did not form, however remotely, a judicial body.

But Augustus gave to certain persons *jus respondendi* by the authority of the Emperor. All that we know of the *jus respondendi* is contained in three passages: one an extract from the *Liber singularis enchiridii* of Pomponius, Dig. I. 2, 1, §§ 48, 49; the second, two sentences from Gaius (I. § 7), as follow: "*Responsa prudentium sunt sententiæ et opiniones eorum quibus permissum est jura condere. Quorum omnium si in unum sententiæ concurrunt, id quod ita sentiunt legis vicem optinet; si vero dissentiunt, judici licet quam velit sententiam sequi; idque rescripto Divi Hadriani significatur;*" the third, a passage in the Institutes, Inst. I. 2, §§ 8, 9, taken from the above cited words of Gaius.

There has been much discussion whether the *responsa* of those jurisconsults who had the *juris respondendi* were made binding on the courts by Augustus, or whether this quality was first given to them by Hadrian. Glasson, Étude sur Gaius, 84–119. But from our present point of view the question of most interest is not at what date the *responsa* acquired a binding character, but whether, after they had aequired that character, they were binding only in

the particular case in which they were given, or whether they were obligatory upon the courts as precedents in later cases. If the former was the fact, then the jurisconsults were simply judges of a superior order, to whom the ordinary magistrates had to submit themselves. If the latter was true, then we have real precedents, analogous to those which prevail in the common law, but more stringent in character.

The extract from Pomponius throws no light on the question; it appears to be consistent with either theory; but the passage of Gaius, taken in its connection, seems to favor the latter view. He says, § 3: "*Constat autem jus* [*civile*] *populi Romani ex legibus, plebiscitis, senatus consultis, constitutionibus principum, edictis eorum qui jus edicendi habent, responsis prudentium;*" and after describing the other enumerated sources of the law, he gives the account of the *responsa prudentium*, above cited, thus seeming to class them among the sources of the law. Further, the expressions "*jura condere*" and "*legis vicem optinet*" are more applicable to opinions which made law than to those which merely decided special cases. In like manner the Institutes of Justinian say (Inst. I. 2, § 3) "*scriptum jus est lex, plebis cita, senatus consulta, principum placita, magistratuum edicta, responsa prudentium,*" and they also adopt from Gaius the expression "*jura condere.*" The most probable opinion seems therefore to be that the *responsa* of those *prudentes* who had the *juris respondendi* had the character of true judicial precedents.

By the time of Diocletian (A. D. 284–305) the *jus respondendi* seems to have ceased to be given, and gradually all the writings of the great jurists of the earlier years of the Empire came to be considered as authorities, without any distinction being made between their *responsa* and their treatises. It was just as if Judge Story's judgments and treatises were to be considered of like weight. The power of adding to the law or of modifying it by judicial decisions had passed away. The law, like the Empire, had reached a period of degredation and sterility. It had no vitality, and could only nourish itself indiscriminately on the past.[1]

[1] "The writings of the jurists who had not possessed the *jus respondendi* were cited as entitled to an authority in no way inferior to that of the writings of privileged jurists, provided only that they were supported by the same *literary* prestige which distinguished the writings of the illustrious privileged jurists. . . . Considering that, in case of the privileged jurists, their other writings, which, of course, had nothing to do with their *jus respondendi*, were ranked on a par with the writings in the *responsa*, it was altogether absurd to insist on the *jus respondendi* as a condition of judicial authority.

So much as to the *responsa prudentium*. The judicial acts of the Emperor were *decreta* and *rescripta*. The *decreta* were decrees, final or interlocutory, in a cause. The rescripts were letters sent to the judges or to the parties in a suit, giving the decision which ought to be rendered. There seems to have been no substantial difference in their effect upon a suit; unquestionably they were alike obligatory upon the judges in the cases in which they were given, but the question arises, as with the *responsa prudentium*, — were they binding precedents?

That in the classical period of the Roman law *decreta* had sometimes the force of precedents, seems the more probable opinion. Gaius, we have seen, gives the *constitutiones principum* among the sources of the law, and he defines the term thus: "*Constitutio principis est, quod imperator decreto vel edicto vel epistula constituit, nec unquam dubitatum est, quin id legis vicem optineat, cum ipse imperator per legem imperium accipiat*" (Gaius, I. § 5). So Ulpian: "*Quodcumque igitur imperator per epistulam et subscriptionem statuit, vel cognoscens decrevit vel de plano interlocutus est vel edicto præcepit, legem esse constat.*" Dig. I. 4, 1, § 1. Again Fronto, who, to be sure, was an orator and rhetorician, rather than a jurist, in an oration to Antoninus Pius, said: "*Tuis decretis, imperator, exempla publice valitura in perpetuum sanciuntur . . . tu, ubi quid in singulos decernis, ibi universos exemplo adstringis: quare si hoc decretum tibi proconsulis placuerit formam dederis omnibus omnium provinciarum magistratibus, quid in ejusmodi causis decernant.*" Fronto, I. 6. See also *Decretum divi Marci*, D. IV. 2, 13; XLVIII. 7, 7.

On the other hand, Justinian says that the binding force as precedents of the imperial decrees had been doubted by some, though he adds, "*vanam scrupulositatem tam risimus quam corrigendam esse censuimus.*" He proceeded to remove any doubt in the matter, and declared, "*Si imperialis majestas causam cognitionaliter examinaverit et partibus cominus constitutis sententiam dixerit, omnes omnino judices, qui sub nostro imperio sunt, sciant hoc esse legem non solum illi causæ, pro qua producta est, sed omnibus similibus . . . cum et veteris juris conditores constitutiones, quæ*

The practice of not discriminating between the different kinds of writings necessarily led to the practice of not discriminating between the authors themselves, — which is only another way of saying that the transfer of the authority of the *responsa* to juristic literature in general had become an accomplished fact." Sohm, Institutes (Ledlie's Transl.) § 17. See also the "Law of Citations" (A. D. 426), Cod. Theod. I. 4.

ex imperiali decreto processerunt, legis vicem obtinere aperte dilucideque definiunt." C. I. 14, 12.

The truth perhaps was, that originally decrees proceeding from the Emperor had only the effect of those pronounced by lower magistrates, and merely settled the particular controversy; that naturally and gradually they acquired the character of precedents; but that old-fashioned lawyers of a conservative turn still clung to the ancient theory; and even Justinian inserted in his Code a rescript, originally published about a century before, which says of interlocutory decrees: "*Interlocutionibus quas in uno negotio judicantes protulimus, vel postea proferemus, non in commune præjudicantibus.*" C. I. 14, 3.

Savigny thought that the imperial *decreta* were not of force as precedents. 1 Heut. röm. Rechts, § 23. But his view is generally disapproved by later writers. 1 Puchta, Inst. § 111; 1 Karlowa, röm. Rechtsgesch. 649 *et seq.*; Esmarch, röm. Rechtsgesch., § 135; Krüger, Gesch. der Quellen, § 14. Cf. Wlassak, Krit. Stud. zur Rechtsq. 134.

Rescripts (with their subvarieties of *adnotationes*, *subscriptiones*, *epistulæ*, *pragmaticæ sanctiones*) were answers to requests for instructions from the judge or parties to a suit. *Rescripta generalia* were of force as precedents. It is not clear what made a rescript *generale*.[1]

But cases were often not fully or fairly presented to the Emperor, and this brought rescripts themselves into disfavor. Trajan is said to have never sent rescripts "*ne ad alias causas facta præferrentur quæ ad gratiam composita viderentur.*" Capitolinus, Vita Macrini, c. 13. In A. D. 398 it was ordered that rescripts should not be regarded as precedents. Theo. Cod. I. 2, 11. This was again declared in A. D. 426, and was finally taken up by Justinian into his Code, C. I. 14, 2. Justinian also declared that no decisions of any magistrates should have the force of precedents. C. VII. 45, 13. The law after Justinian's legislation, therefore, gave the force of binding precedents to the Emperor's decrees, but denied it to the decrees of all other magistrates, as well as to rescripts issuing from any source. Sav. 1 Heut. röm. R., § 24, note (r.).

The idea of precedent was therefore familiar to the Roman law, but its scope was limited. [2]

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[1] The passage which throws most light on this question is Dig. XXII. 6, 9, §§ 5, 6.

[2] See also C. I. 19, 7; C. I. 22, 6; Nov. 113, c. 1; and cf. Dig. I. 3, 34; Dig. I, 3, 38.

In Justinian's law books the opinions of jurisconsults and the decisions of judges in particular cases, having been jumbled together and taken up bodily into the Digest, were enacted as a statute, but in interpreting them they could not be dealt with like statute provisions in the ordinary form; the reasoning applied to them was often like that suitable to the discussion of judicial decisions, and it would have been well if it had been so to a larger extent.

German Law. — In Germany during the Middle Ages the courts were composed of a judge (Richter) and Schöffen. The Richter presided, kept order and gave judgement, but on a doubtful point of law he took the opinion of the Schöffen; and often the Schöffen sought the opinion of the Schöffen of another city or town, either because of their reputation as depositaries of the law, or because of its standing in the relation of mother city to that from which the request came.

The opinions of the Schöffen were generally called Weisthumer. There is a great collection of them by Grimm, the publication of which covered the interval between 1840 and 1878. They took a variety of forms; sometimes they were put as general rules, sometimes as answers to hypothetical cases, and sometimes as opinions in particular real cases. These last availed, it would seem, not only in the cases in which they were delivered, but also as binding in future cases in the same court, and as having a weight beyond their intrinsic merits in other courts. 1 Stobbe, Handb. deutsch. Privatrechts, § 24; Gaupp, Das alte magdeburg. Recht, 90–94.[1]

The introduction of the Roman law into Germany and its driving out of the ancient law were due mainly to doctors of civil law acquiring judicial position. This seems to be the conclusion reached by all the late writers. But the modern German civilians

[1] Widerkind, as cited in 1 Stobbe, Geschichte, § 27, p. 275, gives a curious instance in which a general doctrine was perhaps established by a judgment in a particular case, not however by the opinion of Schöffen. There was a question whether the children of a deceased son could share with the son's brothers in the inheritance from the father. The King "*rem inter gladiatores discerni jussit. Vicit igitur pars, qui filios filiorum computabant inter filios, et firmatum est ut æqualiter cum patruis hereditatem dividerent pacto sempiterno.*"

So in the Imperial Court in 1235, the Emperor Frederick II. established a standing judge and decided: "Idem scribet omnes sententias coram nobis in majoribus causis inventas, maxime contradictorio judictio obtentas, quæ vulgo dicuntur '*gesamint urteil*,' ut in posterum in casibus similibus ambiguitas rescindatur, expressa terra secundum consuetudinem cujus sententiatum est." 1 Stobbe, 466, 467.

have rather ungratefully kicked down the ladder by which they themselves have climbed, and exhibit a great repugnance to recognize judicial decisions or *Gerichtsgebrauch* in any form as a source of law. Perhaps the dislike felt towards the old Schöffen courts may have had something to do with this attitude.

The prevalent view on the subject among modern civilians is expressed in an elaborate and much cited article by Jordan, 8 Archiv. für civil. Prax. 191, 245 *et seq.* He sums it up thus: "Judicial usage (Gerichtsgebrauch) as such, that is by reason of its being judicial usage, has formally no binding force, and materially only so much value as on the principles of a sound jurisprudence belongs to it by reason of its inner nature; and hence a court cannot be bound to follow its own usage or the usage of another court as a rule of decision, but rather has the duty to test every question with its own jurisprudence, and ought to apply usage only when it can find no better rule of decision."

Later writers seem generally to deny that Gerichtsgebrauch is a source of law at all, and consider judicial decisions as merely evidence (just as many other things might be evidence) of customary law. This seems to have been Savigny's opinion. See 1 Heut. röm. Rechts, § 29; and such are the views, for instance, of Wächter, 23 Archiv. f. civ. Prax. 432, and of Keller in his Pandekten, § 3.

Thus Stobbe (1 Handb. d. deutsch. Privatrechts, § 24, p. 165): "Practice is in itself not a source of law; a court can depart from its former practice, and no court is bound to the practice of another. Departure from the practice hitherto observed is not only permitted but required, if there are better reasons for another treatment of the question at law."

Dernberg in his Pandekten is the only recent author whom I have observed fairly to admit that Gerichtsgebrauch is a source of law; and even he says: "Single decisions of a court, even of the highest, do not make Gerichtsgebrauch," which he defines as "the general uniform and long continued existence of a legal tenet by the court of the country." Pand. § 29.

One point especially of the German theory seems very strange to a common-law lawyer. To such the duty of a lower court to follow the precedents set it by the court of appeal seems one of the plainest of judicial obligations, but the German writers, almost to a man, unite in denying this duty. Gengler, § 13, is the only writer cited by Stobbe (1 Handb. § 24, p. 165) who affirms it.

Jordan (and one specimen will do for all) says: "The lower courts act in accordance with the will of the Legislature, if they follow the clear usage of the higher courts, although they are not bound to do so absolutely, but are only held to such following so far as they find it grounded in the will of the Legislature according to their own examination, from which they are never excused." Archiv. f. civ. Prax. 246, 247.

Savigny, § 20, with a vagueness not common to him, says that when the lower courts conform to the jurisprudence of the higher "they do not yield to authority, but enter into the spirit of the legislator, whose wisdom has established the different degrees of jurisdiction."[1]

Scotch Law. — The position assigned to judicial precedents in Scotland seems to be intermediate between that occupied by them on the continent of Europe and that to which they are raised in England.

Erskine in his Institutes, Book I. tit. 1, § 47 (1768), says: "An uniform series of decisions of the Court of Session, *i. e.*, of their judgments on particular points, either of right or of form, brought before them by litigants, and anciently called Practics, is by Mackenzie accounted part of our customary law. Thus far may be admitted. First, that their more ancient decisions, from which it appears that any particluar usage had then acquired the force of law, may be properly brought in proof of that custom, if it have not afterwards lost its authority by an immemorial and universal usage to the contrary; and secondly, that great weight is to be laid on their later decisions, where they continue for a reasonable time uniform, upon points that appear doubtful. L. 38, *de legib.* But they have no proper authority in similar cases, because the tacit consent on which unwritten law is founded cannot be inferred from the judicial proceedings of any court of law, however distinguished by dignity or character; and judgments ought not to be pronounced by examples or precedents. L. 13, C. *de sent. et int.* Decisions, therefore, though they bind the parties litigating, create no obligation on the judges to follow in the same tract, if it shall appear to them contrary to law. It is, however, certain that they are frequently the occasion of establishing usages, which, after they have gathered force by a sufficient length of time, must,

[1] In France it would seem, as in Germany, judicial decisions are not binding precedents, even in inferior courts.

from the tacit consent of the State, make part of our unwritten law. What has been said of decisions of the Court of Session is also applicable to the judgments pronounced upon appeal, by the House of Lords: for in these that august court acts in the character of judges, not of law-givers; and consequently their judgments, though they are final as to the parties in the appeal, cannot introduce any general rules which shall be binding either on themselves or inferior courts. Nevertheless, where a similar judgment is repeated in this court of the last resort, it ought to have the strongest influence on the determinations of inferior courts."[1]

In his Principles, Book I. tit. 1, § 17, Erskine uses substantially the language of his Institutes. In the eighteenth edition by Mr. Rankine (1890) the following is added: "There is a scale of authority from the House of Lords down to the humblest tribunal; and a reported ground of judgment — not being a mere *obiter dictum* — expressed in one case by a superior court, is binding in a similar case in an inferior court, unless and until it is itself reversed or displaced by statute."[2]

The example of the English courts, and indeed the whole tone of the law in England, may have had an influence in elevating the importance of judicial precedents in Scotland above the condition which they fill on the Continent; and also the power given to the Court of Session actually to legislate by means of Acts of Sederunt may have aided to give weight to their judgment in litigated cases.

On the other hand, the fact that the court of ultimate appeal, the House of Lords, was a tribunal composed entirely of English judges (for I believe no one was ever called from the Scotch bench or bar to the House of Lords until the Appellate Jurisdiction Act of 1876), and the irritation which prevailed in Scotland at this state of affairs, had very likely considerable effect in maintaining in that country the doctrine that precedents do not make law.

Common Law. — In England, and in those countries where the English law prevails, a different theory now exists. While in Germany, jurists insist that a decision by a court has, aside from its instrinsic merit, no binding force on a judge, even on a judge from whom an appeal lies to the court rendering the decision, it

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[1] See also the language of the earlier writers, Mackenzie, Inst. Book I. tit. 1, § 10 (1716); Bankton, 1 Inst. Book I. tit. 1, § 74 (1751).

[2] See also 4 Leg. Obs. 289; 24 Journal of Jurisp. 140.

is law in England and in the United States that, apart from its intrinsic merits, the decision of a court has great weight as a precedent with that court and all co-ordinate courts in the same jurisdiction, and is absolutely binding on all inferior courts.

The reason of this distinction is one of the many unsolved problems of comparative jurisprudence. And in the common law itself this regard for judicial precedents is a characteristic of its later, and not of its earlier stages.

Glanville, who was probably the real author of the "*Tractatus de Legibus*," which goes by his name, died in 1190. There seems to be but one reference in his book to a decision of a court. Book VII. c. 1.

Bracton, whose Treatise, "*De Legibus et Consuetudinibus Angliæ*," was written in the middle of the thirteenth century, forms a singular exception to the general rule. He abounds in references to cases. But Mr. Maitland, in his remarkable book, has shown that, with trifling exceptions, the cases cited by Bracton were all decided at courts in which Martin Pateshull and William Raleigh sat as judges. "His is a treatise on English law as administered by Pateshull and Raleigh." [1]

Bracton was exceptional. Fleta, written towards the end of the thirteenth century, was largely drawn from Bracton, but in only one chapter does he refer to particular decisions. In this chapter (Lib. 2, c. 3) he gives three cases as to the jurisdiction of the Steward of the King's Court when the King was out of England, two of them being in Gascony and one in Paris, the last being a decision of the French King's Council that the King of England had jurisdiction over one Ingelramus caught in the English King's hotel with stolen goods. Ingelramus was tried before the Steward and was "*suspensus in patibulo Sancti Germani de Pratis*."

Britton, who also wrote about the close of the thirteenth century, took in like manner largely from Bracton, but I have found no reference whatever in his book to any decision of the courts.

So in the first Year Book yet printed, and which is later than Bracton and nearly contemporaneous with Fleta and Britton, 20 & 21 Edw. I. (1292–1293), the references to decisions are few and brief, *e. g.*, "Witness the case of William de la Bathe" (p. 211): "Note that he who will allege payment must have either a writing or a tally. In the time of Thomas de Weylond a tally was not allowed; now it is" (p. 305). See also pp. 195, 415, 439.

[1] Maitland, Bracton's Note Book, 40, 45, 48 *et seqq.*, 60.

Nor does the citation of cases increase. Fifty years later, 14 Edw. III. (1340), the reports of which fill about two volumes in Mr. Pike's new edition of the Year Books, there are only three cases cited by name either by the bench or at the bar. 14 Edw. III. 37, 63, 247, 253. The other references are all to cases by their Term or other description, *e.g.*, "*Contra Michaelis nono*," and all but one (p. 285) appear to be notes by the reporter or other owner of the book.[1]

Coming down to the end of the century (1400), 2 Hen. IV., we find the Year Book of that year containing reports of 131 cases filling 25 folios. There are three instances in which judges refer to particular decisions, 7 pl. 26; 10 pl. 45; 23 pl. 9. In another case counsel said that a married woman ought not to be allowed to plead in an action of waste after default by her husband, *quod contra dicebatur per totam Curiam eo quod sæpius en tiel case el ad este receive*, 2 pl. 7; again the practice of the King's Bench in replevin is declared to be different from that which prevails elsewhere, 9 pl. 44; in three other cases earlier decisions are referred to, but only not to be followed, 6 pl. 21; 15 pl. 16; 19 pl. 12; and in 21 pl. 20 the reporter notes that the decision made was not afterwards followed.

Let us take a time forty years later (1440), 18 Hen. VI. The reports for this year cover 34 folios. Lovell's Case is referred to twice by name, 8 pl. 7; 9 pl. 7. Besides, in four instances it is said, "*ceo ad este adjuge*," 6 pl. 6; 10 pl. 9; 15 pl. 3, *bis*.[2]

The two legal treatises of the fifteenth century make but little reference to judicial decisions as authority. In Fortescue's book, *De Laudibus Legum Angliæ*, there is no reference to any decided case, and in the seven hundred and forty-nine sections of Littleton's Tenures, only eleven cases are referred to, usually in the briefest manner, §§ 88 (and 94), 96, 157, 383, 412, 420, 514, 643 (and 644), 692, 702, 729.

[1] In Hengham Magna and Hengham Parva, the work of a Chief Justice in Edward I.'s time, a case before Henricus de Bathonia is given at length. Heng. Mag. c. 10 *ad fin.*; the opinion of the same judge is referred to in three other places of the same book, once in c. 8, and twice in c. 9; another case is referred to in c. 13; and there is one reference in Hengham Parva, c. 3.

[2] Lord Coke in the preface to the tenth volume of his Reports, speaking of his own time, says: "The ancient order of arguments by our serjeants and apprentices of law at the bar is altogether altered. 1. They never cited any book, case, or authority in particular, 'as is holden in 40 E. III.,' &c., but '*est temus ou agree in n're livres*,' '*est tenus adjuge in termes*,' or such like, which order yet remains in moots at the bar in the Inner Temple to this day."

Our last examination of the Year Books was in 1440; let us come down fifty years later, to 1490, 5 Hen. VII. In the Year Book for that year we find fifty-three cases, filling forty-one folios. Excluding reporters' notes, there are probably nine places where either court or counsel use "*ceo est adjuge*" or other like expression, — five times with a reference to the year (17 pl. 9; 23 pl. 4, *bis*; 25 pl. 7; 28 pl. 9) and four times without (4 pl. 9; 8 pl. 17; 15 pl. 14; 38 pl. 3). In three other places cases are referred to without name, but somewhat more at length (12 pl. 4; 16 pl. 9; 28 pl. 9); and in 19 pl. 1, the case of Boham *v.* Bishop of Lincoln, 33 Hen. VI. 12; 34 Hen. VI. 38, was relied on by counsel, but repudiated by Bryan, C. J., who said the law would not be held as it was there.

The last year which appears in the Year Books is 27 Hen. VIII. 1535, and of it only three terms are reported. Judicial decisions are more frequently cited; still the references are not numerous.

Descending a generation, we come across one of the most famous and accurate of reporters, and the one perhaps who reported what passed in court at the greatest length, Edmund Plowden. The first ten cases in his second volume, not including the pleadings, fill over fifty folios or one hundred pages, and an examination of them yields the following result: Cases cited and stated as authority, seventeen; legal propositions cited from cases, five; cases cited but disallowed, two; in all, twenty-four cases referred to.

It is fair to remark, however, that in other reporters of the same period a somewhat larger number of references to decisions will be found, and that Plowden himself in one place speaks of his having omitted "many good cases" referred to by the judges.

The practice of citation blossomed out in Lord Coke. Opening in the middle of his reports, we find in the first twenty-five folios of the seventh volume, two hundred and twenty-eight (228) references to cases, — an average twenty times greater than that of Plowden.

Although later judges and writers have not been so prolific as Lord Coke, yet the importance attached to precedents has diminished but little since his time, and, as said above, the rule of the common law is that, aside from their intrinsic merits as the expression of the opinion of able and learned persons, the actual decisions of a court are of great weight with that court and all co-ordinate courts, and are absolutely binding upon all inferior courts.

It seems impossible to give the force of judicial precedents in the common law more exactly; they have great weight, but not irresistible weight. Their decisions can be (and I mean can be according to the theory of the common law) overruled or not followed. Any attempt at more precise determination would result simply in a theory by the particular writer as to what would be desirable rules, and not of what are in fact the principles which govern.[1]

The circumstance that in the English law precedents are to be generally but not always followed, and that no rules have been, or apparently can be, laid down to determine the matter precisely, shows how largely the English law is the creation of judges, for they not only make the precedents, but say when the precedents shall be followed or departed from.

The House of Lords, however, according to modern theory, is absolutely bound to follow its own precedents.[2] This notion is not an ancient one. In 1760 the House in Pelham *v.* Gregory, 3 Bro. P. C. (Toml. ed.) 204, overruled its decision made in 1736, in Brett *v.* Sawbridge, Id. 141, on a question of remoteness. But in 1827, in Fletcher *v.* Sondes, 1 Bligh, N. S. 144, 249, Lord Eton declared that the House was bound by Bishop of London *v.* Ffytche, 2 Bro. P. C. (Toml. ed.) 211, which was the last case where peers, not learned in the law, voted, and in which the courts of Common Pleas and King's Bench were overruled by a vote of nineteen to eighteen.

But in 1821, in the case of Perry *v.* Whitehead, 6 Ves. 544, 548, Lord Eldon said that "a rule of law laid down by the House of Lords must remain till altered by the House of Lords." As late as 1852 Lord St. Leonards expressed an opinion that the House was not bound by any rule of law which they might lay down, Bright *v.* Hutton, 3 H. L. C. 341; and in 1860, in A. G. *v.* Dean and Canons of Winsor, 8 H. L. C. 369, 459, Lord Kingsdown reserved his opinion upon the question; but during this time Lord Campbell was reiterating that the House could not change the rules of law it had laid down. 3 H. L. C. 391; 8 H. L. C. 391, 392;

[1] The best statement of the circumstances which add to or diminish the weight of precedents is to be found in Ram on Judgments.

[2] No such doctrine governs the Judicial Committee of the Privy Council, which is for colonial and certain other matters an ultimate court of appeal. Thus the decision that a colonial legislature had a common-law power to punish contempt, which was made in Beaumont *v.* Barrett, 1 Moore, P. C. 59 (1836), was overruled by Keilley *v.* Carson, 4 Moore, P. C. 63 (1842), the same judge, Baron Parke, delivering the opinion in both cases.

9 H. L. C. 338, 339. Lord Campbell's view seems to have prevailed. See Mersey Docks Trustees *v.* Gibbs, L. R. 1 H. L. 125, per Lord Wensleydale; Hadfield's Case, L. R. 8 C. P. 313.

The most striking difference in the Common and Civil Law, at least as the latter is administered on the Continent, is that under the Civil Law a judge is at liberty to disregard the decision of a higher court. In the Common Law this is never done unless the higher court has committed a palpable error, as for example in Drummond *v.* Drummond, L. R. 2 Eq. 335, where Lord Westbury had decided a case in ignorance of a statute. The only other case I recall in England is Hensman *v.* Fryer, L. R. 3 Ch. 420, where the ruling of Lord Chelmsford, C., that specific devises and pecuniary legacies should abate *pro rata*, has been repudiated by all the Vice Chancellors before whom the question has since come. Collins *v.* Lewis, L. R. 8 Eq. 708; Dugdale *v.* Dugdale, L. R. 14 Eq. 234; Tomkins *v.* Colthurst, 1 Ch. D. 626; Farquharson *v.* Floyer, 3 Ch. D. 109. This was not the case of forgetting a statute, but of a sheer blunder. All the recent writers agree that this was so.

In the United States the general rule and practice as to the weight due to a precedent in the court which made it or in a court of co-ordinate jurisdiction is substantially the same as in England. Naturally, considering the character of the people and of institutions, the weight attached to judicial precedent is somewhat less than in England, but the difference will hardly admit of any precise definition, and it does not seem worth while to attempt it.

The House of Lords will not overrule its own decisions. No such doctrine prevails in America; the highest courts of the respective States, as well as the Supreme Court of the United States, all consider that they have the power to depart from their former rulings, however inexpedient it may be to exercise it. The Supreme Court of the United States has overruled its previous decisions in questions of the gravest moment. Thus in 1825 that court decided that the Admiralty Jurisdiction did not extend on the great rivers above the ebb and flow of the tide, and reaffirmed the doctrine in 1837. But in 1851 it overruled those cases, and held that the Admiralty extended over the great rivers wherever actually navigable. Again in the Legal Tender Cases that court in 1871 changed the ruling which it had made in 1870. Great feeling prevailed in some quarters as to the supposed mode in which this change had been brought about; but the power of the court was not questioned.

The same rule as to the duty of a lower court to follow a precedent established by a higher court prevails in America as it does in England.

It has been said in the United States that a judgment made by an equally divided court, though conclusive in the particular case, should have no weight attached to it as a precedent. See Bridge *v.* Johnson, 5 Wend. 342, 372; People *v.* Mayor of New York, 25 Wend. 252, 256; Etting *v.* Bank of United States, 11 Wheat. 59, 78.

There are several questions within the domain of the Common Law on the effect of precedents. For instance: What is the degree of authority, in the courts of one jurisdiction, of the decisions in courts of other jurisdictions, as compared, on the one hand, with the decisions of the former courts themselves, and on the other hand with *dicta* of judges, or the writings of non-judicial persons? My learned colleague, Professor Wambaugh, has some valuable suggestions on this in the ninth chapter of his treatise on the Study of Cases. Again: What is the weight attributed in the United States to the decisions of the English courts made (1) before the planting of the Colonies; (2) between the planting of the Colonies and the American Revolution; (3) since the Revolution? So again: What authority in the Federal courts of the United States is attributed to the decisions of the courts of a State as determining the law of that State? Or, finally: Are judicial decisions to be considered as making new law, or as simply declaring law previously existing? But to discuss these here would exceed all reasonable limits.

John Chipman Gray.